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No. 10-731

IN THE

Supreme Court of the United States

DAVID G. WALSH, ET AL.,

Petitioners,

v.

BADGER CATHOLIC, INC., ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

BRIEF FOR *AMICI CURIAE* AMERICAN COUNCIL ON EDUCATION AND SIX OTHER HIGHER EDUCATION ORGANIZATIONS IN SUPPORT OF PETITIONERS

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American Council on Education

American Association of Community Colleges

American Association of State Colleges and Universities

American Dental Education Association

Association of American Universities

Association of Public and Land-grant Universities

NASPA—Student Affairs Administrators in Higher Education

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STATEMENT OF INTEREST[1]

The American Council on Education, The American Association of Community Colleges, The American Association of State Colleges and Universities, The American Dental Education Association, The Association of American Universities, The Association of Public and Land-grant Universities, and NASPA—Student Affairs Administrators in Higher Education submit this brief as *amici curiae* in support of petitioners and the grant of certiorari.

Founded in 1918, The American Council on Education (ACE) is the nation's unifying voice for higher education. Its more than 1,800 members include a substantial majority of colleges and universities in the United States. ACE represents all sectors of American higher education—public and private, large and small, denominational and nondenominational. It serves as a consensus leader on key issues and seeks to influence public policy through advocacy, research, and program initiatives.

The American Association of Community Colleges (AACC) is the primary advocacy organization for the nation's community colleges at the national level. The AACC works closely with directors of state offices to inform and affect state policy. Founded in 1920, the AACC represents nearly 1,200 two-year,

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[1] Counsel for *amici* certify that no part of this brief was authored by counsel for any party, and no person or entity other than *amici* or their members made a monetary contribution to the preparation or submission of the brief. Counsel of record for the parties received timely notice of *amici*'s intent to file the brief and gave consent. Copies of the consent letters have been filed with the Clerk.

associate degree-granting institutions and more than 11 million students.

The American Association of State Colleges and Universities (AASCU) represents more than 400 public colleges, universities, and systems of higher education throughout the United States and its territories. AASCU schools enroll more than three million students, which is roughly 55 percent of the enrollment at all public four-year institutions.

The American Dental Education Association (ADEA) is the voice of dental education. Its members include all U.S. dental institutions and many allied and postdoctoral dental education programs, corporations, faculty, and students. The mission of ADEA is to lead the dental education community to address contemporary issues influencing education, research, and the delivery of oral health care for the health of the public. ADEA's activities encompass a wide range of research, advocacy, faculty development, meetings, and communications, including the Journal of Dental Education.

The Association of American Universities (AAU) is an organization of leading research universities devoted to maintaining a strong system of academic research and education. It consists of 60 U.S. universities and two Canadian universities, divided about evenly between public and private. AAU member universities are on the leading edge of innovation, scholarship, and problem-solving, contributing significant value to the nation's economy, security, and culture.

The Association of Public and Land-grant Universities (A·P·L·U) is an association of 186 public re-

search universities and 27 state university systems, including 74 land-grant institutions. Founded in 1887, and formerly known as the National Association of State Universities and Land-Grant Colleges, A·P·L·U member campuses enroll more than 3.5 million undergraduate and 1.1 million graduate students, employ more than 645,000 faculty members, and conduct nearly two-thirds of all academic research, totaling more than $34 billion annually. As the nation's oldest higher education association, A·P·L·U is dedicated to excellence in learning, discovery and engagement.

NASPA—Student Affairs Administrators in Higher Education (NASPA) is the leading voice for student affairs administration, policy, and practice. With more than 11,000 members at 1,400 campuses in 29 countries, NASPA is the foremost professional association for student affairs administrators, faculty, and graduate and undergraduate students. NASPA members are committed to serving college students by embracing the core values of diversity, learning, integrity, collaboration, access, service, fellowship, and the spirit of inquiry

ACE and the other higher education organizations on this brief filed an *amici* brief in support of the respondent officials of the Hastings College of Law in *Christian Legal Society Chapter of University of California, Hastings College of Law* v. *Martinez*, 130 S. Ct. 2971 (2010), a case that also raised First Amendment issues relating to a Registered Student Organization program (RSO program).

STATEMENT

Like many colleges and universities across the country, the University of Wisconsin (the University) has a program under which funds derived from mandatory student activity fees are available to reimburse registered student organizations (RSOs) for the cost of approved extracurricular activities, including speech activities protected by the First Amendment. *See Board of Regents of Univ. of Wis. Sys.* v. *Southworth*, 529 U.S. 217 (2000) (upholding the University's RSO program against a First Amendment challenge brought by students who objected to some of the speech funded by their activity fees).

Badger Catholic, Inc. is an RSO at the University, and most of its activities are reimbursed under the University's RSO program. *See* Pet. 6 (noting that the University approved 86% of Badger Catholic's funding request in 2007-2008). But the University refused to reimburse Badger Catholic to the extent that its activities constituted "worship, proselytizing, and religious instruction"—in other words, "speech that constitutes the practice of religion." Pet. App. 3a. The specific activities for which Badger Catholic sought, but the University denied, funding included:

- Summer training camps with scheduled Catholic masses;
- A mentoring program in which Catholic priests and nuns would offer guidance or prayer if requested by a student;
- A program under which Catholic nuns from Italy would spend the school year in Madison

and assist students in discerning whether they are called to the priesthood; and

- The distribution of Rosary booklets.

Pet. App. 91a-94a.

There is no dispute that the activities at issue do, in fact, constitute "worship, proselytizing, and religious instruction"—for that is how Badger Catholic itself classifies them. *See* Pet. App. 24a (the University "asks the student groups to self-identify those activities that are worship, proselytizing, and prayer and then it only declines to fund such activities").

SUMMARY OF ARGUMENT

Whether a public university must fund the religious worship, instruction, and proselytization of its RSOs is a very important question confronting American higher education following the decision below. Extracurricular programs, including RSO programs, are an important part of the educational process. Among its other benefits, involvement in RSOs gives students the opportunity to discuss issues and express viewpoints on matters of concern. But a university is not required to fund all manner of student speech. An RSO program is a limited public forum, and a university may limit access to such a forum to those student groups and student activities that further the university's educational mission, so long as the access limitations are reasonable and viewpoint neutral. In *amici*'s view, the First Amendment permits, but does not require, a university to fund religious worship, instruction, and proselytization under an RSO program.

The University of Wisconsin has drawn a line between, one the one hand, religions worship, instruction, and proselytization and, on the other hand, speech about religion or speech from a religious perspective. This line is also embedded in federal law, including in numerous Acts of Congress, in an Executive Order issued by President George W. Bush concerning the constitutional rights of faith-based organizations, and in regulations promulgated by the Department of Education and other agencies.

Several federal circuit courts—including the Second Circuit, Fifth Circuit, Ninth Circuit, and Tenth Circuit—have confronted the question presented and reached different conclusions.

The Seventh Circuit misread and misapplied this Court's precedents. This Court's cases do not compel the conclusion that the University must fund the religious worship, instruction, and proselytization activities of Badger Catholic.

ARGUMENT

I. WHETHER PUBLIC UNIVERSITIES MUST FUND RELIGIOUS WORSHIP, INSTRUCTION, AND PROSELYTIZATION BY REGISTERED STUDENT ORGANIZATIONS IS AN ISSUE OF GREAT IMPORTANCE TO HIGHER EDUCATION.

The question presented in this case is whether the First Amendment requires a public university to fund religious worship, instruction, and proselytization by RSOs seeking funding for such activities. This is an extremely important issue facing hun-

dreds of public institutions of higher education in the wake of the Seventh Circuit's decision.

A primary mission of American colleges and universities is, of course, the education of their student bodies. And "extracurricular programs are, today, essential parts of the educational process." *Christian Legal Society Chapter of Univ. of Cal., Hastings College of Law* v. *Martinez*, 130 S. Ct. 2971, 2989 (2010). Indeed, educators and institutions long "have recognized that the process of learning occurs both formally in a classroom setting and informally outside of it. Students may be shaped as profoundly by their peers as by their teachers." *Id.* at 2999 (Kennedy, J., concurring).

The opportunity to participate in student groups is an important component of extracurricular learning. *See id.* at 2989 ("involvement in student groups is 'a significant contributor to the breadth and quality of the educational experience' ") (quoting *Board of Ed. of Indep. School Dist. No. 92 of Pottawatomie County* v. *Earls*, 536 U.S. 822, 831 n.4 (2002)). Programs that support and encourage the formation of RSOs "facilitate interactions between students, enabling them to explore new points of view, to develop interests and talents, and to nurture a growing sense of self." *Id.* at 2999 (Kennedy, J., concurring). As this Court observed in the context the University of Wisconsin's RSO program, a university "may determine that its mission is well served if students have the means to engage in dynamic discussion of philosophical, religious, scientific, social, and political subjects in their extracurricular campus life outside the lecture hall." *Southworth*, 529 U.S. at 233.

Many RSOs are formed in order to promote on-campus discussion of particular subjects or to allow students collectively to express a specific viewpoint. And is settled law that "the First Amendment generally precludes public universities from denying student organizations access to school-sponsored forums because of the groups' viewpoints." *Christian Legal Society*, 130 S. Ct. 2978.

But the First Amendment does not require a university to support student speech of every sort under its RSO program. This Court has recognized that an RSO program is a limited public forum. *See id.* at 2984 n.12. And a "defining characteristic of limited public forums" is that the forum creator may "reserve them for certain groups." *Id.* at 2985 (brackets and quotation marks omitted). Thus, a university may restrict access to its RSO forum so long as its restrictions are both "reasonable and viewpoint neutral." *Id.* at 2984. It need not fund all expressive activities covered by the First Amendment. Flag burning is to some degree a protected activity; so is nude dancing. But a university need not fund a flag burning club or a nude dancing society if doing so would not advance the purposes of its RSO program or its educational mission, so long as the denial of recognition or funding is not based on the viewpoint of the would-be RSOs.

In designing an RSO program, a university has latitude in deciding what student groups and what speech activities will be supported and funded in order to further the institution's educational mission. It may "confine a speech forum to the limited and legitimate public purposes for which it was created." *Id.* at 2986 (brackets and quotation marks omitted).

See id. at 2989 n.17 ("a university has the authority to set the boundaries of a limited public forum"). Deciding "what goals a student-organization forum ought to serve fall within the discretion of school administrators and educators." *Id.* at 2989 n.16. *See also Southworth*, 529 U.S. at 235 (noting the "discretion universities possess in deciding matters relating to their educational mission").

A wide variety of student groups have applied for and obtained RSO status at the University of Wisconsin. In *Southworth*, this Court observed that RSOs at the University "included the Future Financial Gurus of America; the International Socialist Organization; the College Democrats; the College Republicans; and the American Civil Liberties Union Campus Chapter." 529 U.S. at 223. "As one would expect, the expressive activities undertaken by RSOs are diverse in range and content, from displaying posters and circulating newspapers throughout the campus, to hosting campus debates and guest speakers, and to what can best be described as political lobbying." *Id.*

The University also strongly supports speech by religious RSOs. Badger Catholic is one such organization, and the University in past years has funded most of its activities. The University has drawn a line, however, when it comes to the actual practice of religion. In its pedagogical judgment, it decided that religious worship and proselytization differed from speech about religion or speech coming from a religious viewpoint.

The University of Wisconsin is not alone in this regard. Many other public universities have drawn the same line or a similar line. For example:

"Organizations will not be provided funding to support religious worship or religious proselytizing." Virginia Polytechnic Institute and State University, *Student Activity Fee Allocation Policies & Procedures for the Student Budget Board & Registered Student Organization Budget Board* 8 (Oct. 2007);

"Funds will not be provided to student organizations for activities to pay for materials that in any way: * * * 2. financially support lobbying activities or religious worship services." Old Dominion University, *Student Organization Handbook* 16 (2010-2011);

"Activities typically funded through the SBA [Student Bar Association]/Student Assembly include: * * * 9. Peer and Public Education Activities, to support the promotion of knowledge and information on subjects that are not politically partisan or involve religious worship or devotional activities." William & Mary Law School, *Registered Student Organization Handbook* 14 (2009-2010)) (footnote omitted).

"Items that will not be funded * * * 15. Any religious ceremony or worship service, except when such activity is for educational purposes." Pennsylvania State University, UPAC Handbook 6 (July 27, 2010);

"University funds cannot be used to provide *direct* support of religious activities, worship or proselytizing." University of Michigan-Flint, *Student Involvement Handbook* 57 (2010) (emphasis in original);

> "Proselytizing is expressly prohibited at any ASCSU [Associated Students of Colorado State University] funded program * * *." Colorado State University, *The Source: Registered Student Organizations Resource Guide* 33 (2009-2010).[2]

In contrast, at least some public institutions do fund the religious worship and instruction activities of their RSOs. *See* University of Washington Tacoma, *Registered Student Organization Handbook* 16 (2010-2011) ("SAB-CEF [Student Activities Board-Campus Event Fund] funds can be used to support the activities and events of a religious or spiritual registered student organization, including activities and events that involve religious worship, exercise, and instruction."). This is a choice that colleges and universities should be allowed to make in the exercise of their educational judgment and academic freedom.

Amici believe that the Constitution permits, but does not require, public institutions to fund religious worship, instruction, and proselytization as part of an RSO program. *Cf. Locke* v. *Davey*, 540 U.S. 712 (2004) (discussed *infra* at 22-23). Colleges and universities should be free to decide whether funding the practice of religion by a student group supports their pedagogical mission and the purposes of their

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[2] The same source also provides (at pg. 35): "It is expressly prohibited to use funds for any activities prohibited by Federal or State law, including, but not limited to, the following: * * * b. The Constitution of Colorado, Article IX, Section 7, prohibits the expenditure of State funds for any sectarian purpose. An activity with a sectarian purpose would include, for example, the activities of worship, devotion, prayer, meditation, or a religious service."

RSO program. Under the decision below, a university with an RSO program like the one at the University of Wisconsin will be required to fund worship and proselytization by student groups—at least if that university sits within the Seventh Circuit. Many administrators of universities outside the Seventh Circuit face the choice between changing their RSO programs or inviting lawsuits by student groups.

Notably, Badger Catholic sought to collect money damages from the University of Wisconsin administrators that it sued. The District Court and the Seventh Circuit held that University officials were entitled to qualified immunity because the law was not clear at the time Badger Catholic filed suit. *See* Pet. App. 13a, 64a-66a. But, as the District Court warned, "in future cases University officials will not be entitled to qualified immunity, and so an injured student will be able to obtain monetary relief." Pet. App. 101a. This Court should grant the petition and resolve the question presented so that university administrators will know whether they are constitutionally required to fund the practice of religion by recognized student groups.

II. FEDERAL LAW DRAWS THE SAME LINE DRAWN BY THE UNIVERSITY OF WISCONSIN.

The line drawn by the University in the context of its RSO program between religious worship, instruction, and proselytization, on the one hand, and other speech activities (including speech about religion or speech from a religious perspective), on the other hand, is a line that has been drawn in federal law by the President, the Congress, and federal agencies.

In 2002, the President George W. Bush issued an Executive Order addressing the constitutional rights of religious organizations that participate in certain programs funded by the federal government. *See Equal Protection of the Laws for Faith-Based and Community Organizations*, Exec. Order No. 13279, 67 Fed. Reg. 77141 (2002). This presidential directive declared that such religious organizations are entitled to express their views so long as federal funds are not used for "inherently religious activities"—*i.e.*, religious worship, instruction, and proselytization. The Order provides that a "faith-based organization that applies for or participates in a social service program supported with Federal financial assistance" may "continue to carry out its mission," including the "expression of its religious beliefs, provided that it does not use direct Federal financial assistance to support any inherently religious activities, *such as worship, religious instruction, or proselytization.*" *Id.* § 3(f) (emphasis added). The *Faith-Based* Order expressly finds that this funding restriction is "[c]onsistent with the Free Exercise Clause and the Free Speech Clause of the Constitution." *Id.* The Department of Justice has adopted regulations closely tracking the language of Executive Order 13279. *See* 28 C.F.R. § 38.1(c) (religious organizations participating in DOJ-funded programs or services may not use direct financial assistance from DOJ "to support any inherently religious activities, such as worship, religious instruction, or proselytization").

Similarly, Department of Education (ED) regulations provide that an organization that receives a grant under an ED program, or a subgrant from a State under a State-administered ED program, may

not use its grant or subgrant to pay for "[r]eligious worship, instruction, or proselytization." 34 C.F.R. § 75.532(a)(1); *id.* § 76.532(a)(1). *See also* 69 Fed. Reg. 31708, 31712 (2004) ("Organizations that receive direct Department funds may not use these funds for inherently religious activities."). ED has explained that these conditions on the use of federal funds do not infringe religious liberty:

> The restrictions on the use of grants and subgrants for inherently religious activities do not prohibit faith-based organizations from engaging in inherently religious activities. The restrictions only prohibit such funds from being used to support these activities. * * * Faith-based organizations, like other private organizations, must use the Federal funds for the purpose of the applicable program. [68 Fed. Reg. 56418, 56419 (2003).]

Likewise, numerous Acts of Congress dealing with the funding of education deny funding for religious worship, instruction, or proselytization. *See, e.g.*, 20 U.S.C. § 7885 ("Nothing contained in this chapter shall be construed to authorize the making of any payment under this chapter [to private schools] for religious worship or instruction."); *see also* Pet. 35 n.23 (listing similar federal statutes); *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 885 n.9 (1995) (Souter, J., dissenting) (observing that "Congress * * * routinely excludes religious activities from general funding programs.") (citing, *inter alia*, 20 U.S.C. § 1062(b), 20 U.S.C. § 1069c, 20 U.S.C. § 1132c-3(c), 20 U.S.C. § 1132i(c), and 20 U.S.C. § 1213d)).

In sum, the line drawn by the University in its RSO funding program is identical to the line drawn

by the Executive Branch and Congress. RSOs at the University may receive University funds and express their views, but such funds may not be used for worship, proselytization, or religious instruction, which are inherently religious activities. This is a line that the President, DOJ, and ED have found to be constitutional in the context of federal funding programs. Absent review by this Court, the Seventh Circuit's decision will jeopardize the federal statutes and regulations that draw this same line. *See infra* at 19-20 (discussing the nullification of the line drawn in the Older Americans Act by the Tenth Circuit in *Church of the Rock* v. *City of Albuquerque*, 84 F.3d 1273 (10th Cir.), *cert. denied*, 519 U.S. 949 (1996)).

III. THE FEDERAL CIRCUITS ARE DIVIDED ON THE QUESTION PRESENTED.

The Petition for Certiorari identifies federal appellate decisions from the Second Circuit and Ninth Circuit that conflict with the decision below. *See* Pet. 20-26 (discussing *Faith Center Church Evangelistic Ministries* v. *Glover*, 480 F.3d 891 (9th Cir. 2007), and *Bronx Household of Faith* v. *Board of Ed. of City of N.Y.*, 492 F.3d 89 (2d Cir. 2007)). This inter-circuit conflict provides a powerful reason for this Court to grant review in this case. *See Braxton* v. *United States*, 500 U.S. 344, 347 (1991) ("A principal purpose for which we use our certiorari jurisdiction * * * is to resolve conflicts among the United States courts of appeals and state courts * * *."). Three other circuit court cases further demonstrate the conflict and confusion in the lower courts over the issue presented for review.

a. In 2000, the Fifth Circuit upheld a school dis-

trict policy that permitted outside groups to use school facilities to discuss religious material, but did not permit such groups to engage in religious worship or religious instruction in those facilities. *See Campbell* v. *St. Tammany's School Bd.*, 206 F.3d 482 (5th Cir.), *reh'g denied*, 231 F.3d 937 (5th Cir. 2000), *GVR'd*, 533 U.S. 913 (2001), *on remand*, 300 F.3d 526 (5th Cir. 2002), *on remand*, 2003 WL 21783317 (E.D. La. July 30, 2003). *Campbell* involved a Louisiana school district's building use policy, which permitted after hours use of school facilities for civic, recreational, or entertainment purposes, but not for (1) partisan political activities, (2) for-profit fundraising, or (3) "religious services or religious instruction." 206 F.3d at 484. Although the policy did not allow religious services or instruction within school facilities, it expressly permitted the use of facilities for the purpose of "discussing religious material or material which contains a religious viewpoint." 231 F.3d at 943. Thus, much like the University's approach here, the Louisiana school district policy permitted within its forum speech about religion and speech from a religious perspective, but did not permit the actual practice of religion within the forum.

The school district denied the plaintiffs' request to use school facilities for a "prayer meeting" at which the they planned to "worship the Lord in prayer and music" and "engage in religious and Biblical instruction." 206 F.3d at 485. The plaintiffs brought a First Amendment challenge to the school district's policy, but the Fifth Circuit upheld the policy. The court held that the school district had created a "limited public forum." 231 F.3d at 941. It also held that the policy was viewpoint neutral, explaining that the policy excludes "religious activities but does not

forbid speakers on general topics with a religious perspective—a distinction that viewpoint neutrality permits." 206 F.3d at 487. "The policy's express tolerance of discussion from a religious viewpoint rebuts any inference of viewpoint discrimination." 231 F.3d at 943.

Although the decision of the Fifth Circuit panel was unanimous, the *Campbell* case sharply divided the court as a whole. Five Fifth Circuit judges dissented from the denial of rehearing en banc. The plaintiffs in *Campbell* filed a petition for certiorari, and this Court granted the writ, vacated the judgment, and remanded for reconsideration in light of *Good News Club* v. *Milford Central School*, 533 U.S. 98 (2001). The Fifth Circuit in turn remanded to the District Court. In a concurring opinion, one of the panel members expressed the view that there was a "significant" difference between *Campbell* and *Good News Club*. 300 F.3d at 528 (Gibson, J., concurring). Specifically, in *Good News Club* the decision to deny access to the forum to a religious speaker was "based on the applicant's *viewpoint*, rather than the subject matter presented." *Id.* (emphasis in original).

On remand, the District Court struggled mightily. It found that *Campbell* was not controlled by this Court's decisions in *Good News Club*, *Rosenberger*, and *Lamb's Chapel* v. *Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993). *See* 2003 WL 21783317, at *8 n.12 ("The prior cases are distinguishable"). It recognized that "[t]he Supreme Court has not held that a religious service or religious worship may not be excluded from a limited forum." *Id.* at *8. Nevertheless, relying on what it called "the cryptic *in dicta* fourth footnote of *Good News*," the

District Court ruled for the plaintiffs on the ground that "Campbell proposed what *primarily* was a religious service—a 'prayer meeting,' however, it was not *merely* a religious service. The proposed meeting included a discussion of family and political issues, from a legally protected religious viewpoint." *Id.* at *9 (emphases in original). The court so held while recognizing that it "is difficult to imagine any religious service, no matter how sectarian or nontraditional" that is "merely" a religious service. *Id.* The District Court's decision on remand was not appealed to the Fifth Circuit.[3]

b. In *Full Gospel Tabernacle* v. *Community School District 27*, 164 F.3d 829 (2d Cir. 1999), *affirming* 878 F. Supp. 214 (S.D.N.Y. 1997), a church and its pastor sought access to after school hours to a New York public school to conduct religious worship services. The Board of Education denied the requested access based on state law and Board policy prohibiting the use of school facilities for such purposes. The District Court and the Second Circuit rejected the plaintiffs' First Amendment challenge. The District Court concluded that the school facilities were a "limited public forum," 878 F. Supp. at 220, and that "the exclusion of religious worship services is reasonable in light of the purposes served by the forum and viewpoint neutral," *id.* at 224 (citing *Bronx Household of Faith* v. *Community Sch. Dist. No. 10*, 127 F.3d 207 (2d Cir. 1997)). The Second Circuit affirmed "substantially for the rea-

[3] Although the Fifth Circuit's judgment was vacated to allow that court to consider *Good News Club*, the Fifth Circuit opinions, the en banc vote, and the proceedings on remand vividly illustrate how the question presented has divided the federal judiciary.

sons" articulated by the District Court. 164 F.3d at 830. Thus, the decision below conflicts with the Second Circuit's decision in *Full Gospel Tabernacle* as well as that court's decision in *Bronx Household of Faith*.

c. The inter-circuit split also includes the Tenth Circuit's decision in *Church of the Rock* v. *City of Albuquerque*, 84 F.3d 1273 (10th Cir.), *cert. denied*, 519 U.S. 949 (1996), which aligns with the decision below. In *Church of the Rock*, a church pastor sought to use a Senior Center owned and operated by the City of Albuquerque "to show a two-hour film entitled *Jesus*. The film recounts the life of Jesus Christ as described in the Gospel of Luke." 84 F.3d at 1277. At the end of the film, the narrator "invites viewers to adopt the Christian religion and to join him in a short prayer." *Id.* The pastor also sought permission "to give away giant-print New Testaments to persons attending the film." *Id.* City policy permitted groups to use Senior Centers "for classes and other activities if the subject matter is 'of interest to senior citizens.'" *Id.* The pastor's request, however, was denied on the ground that "City policy prohibited the use of Senior Centers 'for sectarian instruction or as a place for religious worship.'" *Id.*

After classifying the Senior Center as a "designated public forum," 84 F.3d at 1278, the Tenth Circuit held that the City's policy was "a viewpoint-based restriction on speech" in violation of the First Amendment. *Id.* at 1279. The Tenth Circuit stated that "the City had already opened the doors of its Senior Centers to presentations about religion, such as The Bible as Literature and Myths and Stories About the Millennium" and therefore the City had to

allow the showing of a film "advocating the adoption of the Christian faith." *Id.* The Tenth Circuit also held that, "even if the City had not previously opened the Senior Centers to presentations on religious subjects, its policy would still amount to viewpoint discrimination" because, in the court's view, "[a]ny prohibition of sectarian instruction where other instruction is permitted is inherently non-neutral with respect to viewpoint." *Id.*

The Tenth Circuit rejected the City's argument that its policy was necessary to comply with a federal statute, the Older Americans Act, "which requires as a condition for receiving federal funding assurances that a 'facility will not be used and is not intended to be used for sectarian instruction or as a place for religious worship.'" 84 F.3d at 1280 (quoting 42 U.S.C. § 3027(a)(14)(A)(iv)). Although the Tenth Circuit recognized that the City's policy "mirrors the language of the Older Americans Act," it ruled that "compliance with the Older Americans Act does not justify this viewpoint-based restriction on expression." *Id.* Thus, the court held unconstitutional the line drawn by Congress between "sectarian instruction" and "religious worship" versus other expressive activities.

IV. THE SEVENTH CIRCUIT MISREAD THIS COURT'S PRECEDENTS.

The key precedents of this Court that the Seventh Circuit consulted do not compel the Circuit's conclusion that the University must fund Badger Catholic's religious worship, instruction, and proselytization.

The Seventh Circuit primarily relied upon *Widmar* v. *Vincent*, 454 U.S. 263 (1981). *See* Pet. App. 4a-5a. In *Widmar*, this Court held that the First Amend-

ment required the University of Missouri at Kansas City (UMKC) to allow a registered religious student group called Cornerstone to use classroom space and the student center for its meetings, which included such "religious worship" activities as "prayer, hymns, Bible commentary, and discussion of religious views and experiences." 454 U.S. at 265 & n.2. The *Widmar* Court found that UMKC had "created a forum generally open for use by students," *id.* at 267, and, accordingly, applied strict scrutiny. *See id.* at 269-270. But this Court's jurisprudence in this area has developed in the 20 years since *Widmar* was decided, and the law is now clear that an RSO program is a limited public forum and is not subject to strict scrutiny. Instead, a university may place reasonable, viewpoint-neutral conditions on access to an RSO forum. *See, e.g., Christian Legal Society*, 130 S. Ct. at 2984.

The Seventh Circuit also relied upon *Rosenberger*, *see* Pet. App. 5a-6a, but that case did not involve the same sort of activities for which Badger Catholic seeks funding. The student group in *Rosenberger*, Wide Awake Productions, sought funding for a student newspaper that presented a Christian perspective on matters of interest to University of Virginia (UVA) students. *See* 515 U.S. at 826. Wide Awake Productions was not considered a "religious organization" under UVA guidelines, which defined as "an organization whose purpose is to practice a devotion to an acknowledged ultimate reality or deity." *Id.* UVA denied funding for the newspaper because of its religious viewpoint —that it "promoted or manifested a particular belief in or about a deity or an ultimate reality" (*id.* at 827, brackets omitted)—not because it constituted the practice of

religion. As the District Court recognized in *Badger*, "*Rosenberger* is distinguishable because it involved university funding of a much narrower range of student activities" than "the wide-ranging and highly sectarian funding requests at issue in the present case." Pet. App. 89a, 95a.

The Seventh Circuit discussed, but did not follow, *Locke* v. *Davey*, 540 U.S. 712 (2004). *See* Pet. App. 8a-9a. In *Locke*, this Court upheld a scholarship program enacted by the State of Washington for postsecondary education that barred recipients from using the scholarship to pursue a degree in devotional theology. This Court rejected a Free Exercise Clause challenge to the theology exclusion. The Court also held that the Establishment Clause did not compel the exclusion. Thus, the State could, but was not required to, extend the scholarship program to theology degrees. *See* 540 U.S. at 719 ("[T]here are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause.").

The Seventh Circuit rejected the University's argument "that it has made the sort of choice that Locke approved." Pet. App. 9a. The Circuit said that the scholarship program in Locke "did not evince hostility to religion," *id.*, implying that the University's decisions do evince such hostility. But the University is not hostile toward Badger Catholic's religion: the University has registered Badger Catholic as an RSO and funds most of its activities. "The University generally approved [Badger Catholic]'s 2007-08 budget," and funds many of Badger Catholic's activities, "including large and small group discussions, educational and service offerings, thea-

ter and choral activities, and student orientation and welcoming activities." Pet. App. 36a, 37a. The University has simply "drawn a line between religious speech and religious expression amounting to worship, proselytizing and sectarian instruction." *Id.* at 1132. The District Court, notably, did not believe that the University had discriminated against Badger Catholic's viewpoint. "In fact, the University funds a considerable amount of [Badger Catholic]'s religious speech, which shows that the University is not attempting to exclude religious viewpoints from its forum" *Id.* at 57a. "Plaintiffs have identified no topic on which the University has excluded religious viewpoints." *Id.* at 56a. *See also id.* at 96a n.6 ("the University did not discriminate against [Badger Catholic] because [Badger Catholic] intended to present a Catholic or religious viewpoint").

The Seventh Circuit also distinguished *Locke* on the ground that that case involved "selective funding as a permissible public choice, versus selective funding as impermissible restriction on private choice in a public forum." Pet. App. 10a. The Seventh Circuit said that *Badger Catholic* involved the latter situation, and that "a university cannot shape Badger Catholic's message by selectively funding the speech it approves, but not the speech it disapproves. *Id.* But the Seventh Circuit seems not to have appreciated the fact that a university may limit its RSO forum to speech that advances the purposes for which the forum was created, so long as any restrictions are reasonable in light of those purposes and are viewpoint-neutral. *See Christian Legal Society*, 130 S. Ct. at 2984. "The necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the State in reserv-

ing it for certain groups or for the discussion of certain topics." *Rosenberger*, 515 U.S. at 829. Furthermore, universities are entitled to some deference in these matters: "determinations of what constitutes sound educational policy or what goals a student-organization forum ought to serve fall within the discretion of school administrations and educators." *Christian Legal Society*, 130 S. Ct. at 2889 n.16. The Seventh Circuit gave no deference to the University on this score.

CONCLUSION

The Petition for Certiorari should be granted.

Respectfully submitted,

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